MEMORANDUM

DATE: February 25, 2008

TO: Chairman Jim Taylor; Public Defender Commission Members; Chief Public Defender Randy Hood; and Chief Financial Officer Harry Freeborn

RE: Attendance at the SCLAID Conference on February 7 & 8, 2008

I attended the ABA mid-winter meeting which was held on February 7 & 8, 2008 in Los Angeles. Specifically, I attended the all-day conference on Friday that was hosted by the Standing Committee on Legal Aid and Indigent Defense (SCLAID). This year's summit was on indigent defense improvement.

In early January, Georgia Vagenis, the executive secretary for that committee, contacted me. She asked if I would give a presentation on the progress that has been made in the state of Montana. I agreed to do so. My notes for that presentation are attached hereto as Appendix A.

The topics of this year's conference included:

1. A presentation on wrongful convictions which included references to the situation here in Montana;

2. The impact of the media on reform efforts and enlisting the media in efforts in your state;

3. Case overload, ethical and political considerations and, when all else fails, shut downs, litigation and contempt proceedings;

4. National developments in review and lessons learned (this portion included my presentation);

5. An open discussion regarding current problems and concerns in the various Public Defender systems throughout the country.

The topic regarding wrongful convictions focused not only on what has happened, but on potential reform of criminal discovery statutes and rules in an attempt to prevent wrongful convictions in the past based upon a failure to disclose exculpatory evidence. There was also some additional discussion about enactment of rules or statutes that would require the recording of would-be confessions. One of the presenters presented a model bill for standard discovery in criminal cases. As we all know, Montana has fairly broad discovery. I have, nevertheless, attached a copy of that bill to this memo as Appendix B. One of the highlights of that bill is the fact that it imposes duties upon Prosecutors in the absence of any request by the Defense and Section 4.F. requires the Prosecutor to certify, in writing, that it has fully complied with the disclosure obligations contained in the Act. This certification also requires a written statement from a designated lead investigator

from each law enforcement agency involved in the investigation of the charges that confirms that the agency has given the Prosecution all information that, if known to the Prosecution, would be discoverable. This certainly goes beyond the mandates of our current statutes.

If I recall correctly, I mentioned in last year's memorandum that the much anticipated discussion on caseload management that was presented last year was really a teaser. There was a lot of discussion about ethical obligations and theory, but no real formulas or mechanisms for fixing the problem. When the subject was placed on the agenda again this year, I looked forward to the presentations with anticipation. Once again, however, I really received very little in the way of substance. Much of the time was spent discussing how to prepare for and declaring that the services of any given Public Defender agency would no longer be available because caseloads had become unmanageable. Hopefully, I will not be referring to those materials in the near future for guidance.

I had hoped to have a meaningful discussion with James Neuhard, the head of the Michigan Appellate Defender Office. He has been involved in putting together caseload formulas for decades. Their numbers, however, don't really translate to our numbers. I learned this in a discussion with Dawn Van Hoek, another summit speaker. She is the Chief Deputy Director for the Michigan Appellate Defender Office. Frankly, much of the conversation I had with Ms. Van Hoek involved the fact that Michigan was in a very dire funding crisis.

In summary, SCLAID and the work of the Public Defender Commissions that have gone before us has been invaluable in allowing us to avoid pitfalls that other statewide agencies have experienced. At this point, however, we are probably on the cutting edge and are able to provide some insight to other state agencies on how to run a statewide program of this type. I doubt that we will ever get any real caseload formulations from other states that will work for us. Most states are still content with vague statements as to caseloads or are floundering with number systems that are unrealistic and not really followed.

Michael J. Sherwood

Michael J. Sherwood, Esq.
Attorney-at-Law
P.O. Box 8358
Missoula, Montana 59807
Tel: (406) 721-2729
FAX: (406) 728-8878
mike@mjsherwoodlaw.com

Montana Public Defender Commission Member

2008 REPORT OF THE MONTANA OFFICE OF THE STATE PUBLIC DEFENDER

I. Accomplishments.

A. Web-site: Since coming into existence on July 1, 2006 and taking over the role of representing indigent citizens entitled to state-paid counsel on July 1, 2007, the Montana Public Defender Commission and the Montana Office of the State Public Defender (collectively referred to below as the "OPD") has set up a web site at http://publicdefender.mt.gov/.

B. Software: For details beyond what can be presented here, please feel free to contact OPD's IT Manager, Teri Heiland who e-mail address is TeriHeiland@mt.gov. OPD's IT personnel have adopted JustWare as the state-wide software for the system. The people at JustWare have worked with the OPD to fine tune the program. This was done in four stages because the OPD inherited County JustWare systems that differed in capability and needed significant modification. It was only this fall that the OPD succeeded in "rolling out" a Comprehensive Case Management System. The system currently allows the OPD to:

1. determine past and current case counts by case type as mandated by statute;
2. identify approximately 23 factors associated with any given case (ranging from the regional office handling case to ethnicity or nationality of a client.

Long term, JustWare assures the OPD that the system will allows the OPD to:

1. track attorney time dedicated to each case or type of case as mandated by statute;
2. track all other defense costs associated with any given case or type of case;
3. incorporate the Delphi system discussed below regarding case loads of staff attorneys.

B. Mental Health: The OPD has hired an in-house mental health professional who has brought about significant cost savings through standardized billing at uniform rates and establishing a written protocol for how evaluations are to be handled and the

appropriate scope of evaluations. Previously, mental health professionals were charging their "going rate" and often performing evaluations far beyond what was necessary in some cases.

C. Newsletter: The OPD now has a newsletter (available at the above link) to keep staff and contract lawyers abreast of OPD developments and issues. The OPD hopes to combine this letter with the Appellate Defender Letter mentioned below to summarize all:

1. U.S. Supreme Court decisions;
2. Ninth Circuit decisions; and
3. Montana Supreme Court decisions.

The OPD currently mails out the newsletter to all Contract Lawyers in an effort to assuage current ill will that has developed. The OPD plans to only e-mail the letter at some future date.

D. Standards: With extensive reliance on standards adopted by other states, the OPD has adopted 106 pages of standards (the entire text of which is available at the above link) relating to 21 different subjects. A copy of the Table of Contents attached as Appendix "A." The Commission has decided not to adopt the Standards as Administrative Rules. Instead, the Standards have been included in the Employee Policy Manual and Incorporated by reference into all Memoranda of Understanding with Contract Lawyers. Initially the standards were advisory. Compliance is now mandatory.

E. Forms: The OPD has adopted standardized forms (all available at the above link) for:

1. Assignment of a case to the OPD;
2. Client Applications:
3. Client Complaints;
4. Memorandum of Understanding with Contract Lawyers;
5. Requests for pre-approval of litigation costs and mental health costs, both for evaluations and expert witnesses;
6. Travel expenses
7. Screening potential conflicts;
8. Initial client interviews for adult criminal, juvenile delinquency, and mental health cases.
9. Contract attorney claim forms;
10. Non-attorney claim forms.

F. Training: (See link)

1. The OPD has a separate Training Supervisor position mandated by statute.
2. In the last 18 months the Training Supervisor has put together in excess of 40 CLE's.
3. The Training Supervisor publishes a separate training newsletter including a Montana Supreme Court update authored by the State Appellate Defender's Office.
4. Many of the training sessions were video taped and most have been audio taped.
5. The training officer has made these tapes available to outlying lawyers and sought CLE certification through the State Bar.
6. The OPD has coordinated seminars with the Montana Association of Criminal Defense Lawyers (MTACDL;
7. The OPD has negotiated a lower MTACDL membership and seminar rate for OPD staff lawyers.

G. Contract Lawyers:

1. Learning from the experience in Georgia and other states, the OPD has avoided any fixed contracts with lawyers;

2. Instead, we've developed a Memorandum of Understanding (MOU) with Contract Lawyers whereby:

   A. A lawyer who accepts assignment of a case agrees to work at a set rate per hour, submit billing within 45 days of completing any work, obtain CLE credits beyond those mandated by the State Bar; and familiarize her/himself with and comply with all applicable OPD Standards; and,

   B. The OPD agrees to pay promptly and provide support services when requested and as provided in the OPD Standards.

3. The MOU does not commit the OPD to continue to offer to assign cases, nor does it commit the Contract Lawyer to accept assignment of cases. This relationship has allowed the OPD to weed out the lawyers that were milking the system or were of questionable competence.

4. The OPD has negotiated a bulk, and drastically reduced, licensing rate for Lexis available to our Contract Lawyers ($20/month);

II. Problems:

1. **Employee Rapport:** Rapport with in-house employees remains tentative. The staff attorneys have unionized. It has been difficult to get employees of former systems to change former practices, such as now requiring them to:

    a. Track their time;
    b. See new clients in a timely fashion;
    c. File discovery motions;
    d. Accompany the client when the client meets with the probation officer for a pre-sentencing interview;
    e. Review written materials submitted by a client to the probation officer preparing the pre-sentence report; and
    f. Fill out the initial client interview questionnaire.

2. **Contract Lawyer Rapport:** Rapport with Contract Lawyers has been very adversarial.

    a. Former "dead weight" lawyers winnowed from the system have gone to judges and the media complaining of the system;

    b. Current lawyers have railed at $60.00/hour in spite of the fact not a single Contract Lawyer responded to a plea from the OPD to attend and testify at legislative budgeting hearings in the last session; and

    c. Lawyers that were doing nothing short of defrauding the system when vouchers were supposedly reviewed (but seldom were) and approved by judges have challenged OPD in-house review policies. Some have threatened to sue. In the year prior to the OPD taking over, one attorney had been appointed to 80 felony cases, tried none, failed to file a single pre-trial motion in any case, spent several weeks in Europe, and billed the state for 2,500 hours of time.

3. **Setting Numerical Case Load Standards:** The OPD is currently implementing a modified Delphi System in two of it's eleven offices. The system was created and is reviewed and modified by a Lawyer-Management Joint Committee. The chair of that committee alternates between a staff attorney and a management attorney. The experimental system has the following characteristics:

    a. The case count is based upon intake numbers. The OPD very much wanted a real-time rather than annual case load count, but could not figure out a way to get an open-case count due to the erratic fashion in which lawyers closed (or failed or refused to close) their case files;

b. The case count is based upon the previous 12 months.

c. Cases are weighted on a point system that mandates a lawyer take no more cases during a month when the lawyer's previous 12 month load has totaled 150 points. Regional supervisors are currently authorized a 20% variance in this number.

d. Lawyers also are awarded points for non-legal defense activities such as participating in the activities of the Lawyer-Management Committee which created and oversees the case load system, and speaking at CLE's.

4. Conflict Case Management. The OPD has decided to treat each of the eleven regional offices as separate legal entities. Computer and hard copy case files are not shared between regional offices. Conflict cases are assigned either to: (1) a staff attorney in another regional office; or (2) a contract attorney. Initially, the OPD contracted with a lawyer who would assign conflict cases and oversee the performance of the contract lawyers handling those cases. Eventually, the OPD, after some fiscal input from legislative purse holders, determined that it lacked legislative authority to pay the conflicts manager. The existence of a conflict in any given case is determined by the Regional Managing Attorney.

5. Soft Caps. The OPD's in-house counsel who has the thankless task of reviewing performance of, and fees charged by Contract Lawyers noted that some lawyers were charging significantly higher fees than others for handling similar cases. The Commission proposed the possibility of "soft caps" on some cases which would require pre-approval for fees that exceeded certain limits. The proposal raised a hue and cry of resentment from the Contract Lawyers as a whole. The Commission has tabled the idea until JustWare is able to give us more specific data to analyze the extent of the problem. In the meantime, the OPD is attempting to avoid assigning cases to those who have been identified as "problem" attorneys. Sizeable geographic distances, and a lack of available attorneys in some areas of the state, however, have sometimes required the OPD to continue to do business with some problem attorneys.

6. Money: Prior to the current system, the state, county, and municipal governments had no way to track even the number of cases in which counsel were appointed, much less the cost of doing so. The Legislature projected a need for an annual budget of approximately $13 million. (The Supreme Court had failed to add in $2.5 million that it had spent the previous year.) Even at $15.5 million, the OPD could not meet minimum needs. Eventually, the legislature funded the OPD at $19 million. The OPD is finding, however, that it's staff attorneys don't have enough hours in the day to effectively perform the tasks required by the standards. This because case loads have swelled beyond projections.

In addition, the OPD has not experienced the sort of decrease in Contract Lawyer fees that it had hoped would occur when cases retained by Contract Lawyers at the time the

OPD took over the system were closed.

III. Future Improvements: The to-do list includes:

A. Brief Bank: Develop of a brief bank in cooperation with MTACDL.

B. Case Load Management: Continue to improve the Delphi Case Load system.

C. Lobbying by Contract Lawyers: Organize and mobilize the Contract Lawyers to approach and lobby the legislature for a budget increase that would allow the OPD to pay the $80.00 per hour the Contract Lawyers are requesting.

D. Incentive Clause: Reach an agreement with the Contract Lawyers for an incentive clause in the MOU which will provide for a slightly higher hourly rate for attorneys who have:

1. INTERNET legal research capability; and/or
2. Full or part-time staff.

E. Utilization of Data. Utilize the financial data inputted into and sorted by JustWare to impress upon the legislature:

1. The incredible expense of capital punishment cases; and

2. The need to impose comparable financial limitations on prosecutors when hiring mental health and other professional experts.

Appendix "A"

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"If there is evidence sufficient to convict someone beyond a reasonable doubt, there is nothing to fear about opening the file to the defense."[77]

James Coleman
Duke Law
Raleigh News & Observer, November 16, 2003

"There is a greater chance of upholding the conviction on appeal if all prosecutors handled this [discovery] in the same way. If you have to provide open-file discovery post-conviction you might as well do it at trial in order to reduce the chance of a conviction being overturned."[78]

Roy Cooper
North Carolina Attorney General
Raleigh News & Observer, November 16, 2003

"And 'open-file' discovery policies — where the police and prosecutors share all the evidence they have collected with the defense — would ensure that any evidence, including evidence helpful to the defense, is disclosed. Many prosecutors who already have adopted 'open-file' policies support them, in part, because they encourage defendants to plead guilty once they are aware of the strength of the government's evidence."[80]

John Gould
Professor of Law, George Mason University
The Richmond Times Dispatch, April 12, 2005

QUESTIONS & ANSWERS

Why are open-file discovery laws needed? Aren't limited discovery laws sufficient?

The defense needs to have access to all material evidence in the possession of the prosecution or any third party investigatory agencies, both to ensure a fair outcome and to protect the defendant's right to due process. Limited discovery during the trial phase creates the risk that some material evidence will be provided without adequate time for appropriate use, or even missed entirely. For example, if defense attorneys aren't provided with witness statements until after the witness has testified, they have only moments to prepare for cross-examination.

Unlike criminal cases, discovery laws regulating civil suits allow for open-file access to the opposing counsel's files including witness statements, police reports, and insurance information; this open-file access is even more critical in cases where a defendant's liberty — or even life — is at risk.

In addition to an open-file policy, the ABA standards provide a model for discovery statutes, because they present a clear enumeration of what evidence must be exchanged, including written statements made by the defendant or co-defendant, witness lists, expert witnesses, and the inspection of physical evidence.

Many states grant defendants open-file access to the prosecution's files during the appeals process. Why should open-file access be extended to the trial phase?

Innocent suspects should not have to wait for the appeals process for the court to determine that they are not guilty. By making discovery available to the defense at the outset of the criminal process, defendants are able to argue their innocence effectively and the court can avoid wrongfully convicting them in the first place. North Carolina's experience highlights this problem. In 1996, North Carolina passed legislation granting death row inmates open-file access to police reports and prosecutors' files during the appeals process; then in 2004, after five capital cases were overturned due to suppressed evidence, the state General Assembly enacted legislation granting open-file access to all felony cases. In the interim between 1996 and 2004, many prosecutors had begun to share information with the defense voluntarily, believing it made the trial process more efficient and that convictions were more likely to be upheld during an appeal. In the words of North Carolina Attorney General Roy Cooper, "If you have to provide open-file discovery post-conviction, you might as well do it at trial in order to reduce the chance of a conviction being overturned."[81]

Why are the current standards requiring the prosecution to turn over material evidence insufficient?

In the 1963 case, *Brady v. Maryland*, the Supreme Court established that the prosecution must submit all exculpatory evidence to the defense prior to trial. While the Court specified that the material must be turned over in a timely manner, it did not define what amounts to "timely." Subsequent cases *(i.e., Kyles v. Whitley)* narrowed this standard, stating that only material which would have changed the outcome of a trial constitutes material evidence. Taken together, these rulings require a predictive determination of what evidence meets the materiality requirement, and prosecutors may inadvertently suppress evidence due to unfamiliarity with the defense's case and inability to forecast what evidence may prove material in the context of the defense strategy. This creates competing roles for the prosecutor, who must both try the defendant and anticipate what evidence may later prove to have changed case outcome.

In addition, the *Brady* ruling only applies to cases that go to trial; in ninety-five percent of cases, however, the defendant pleads guilty in a plea bargain. Because *Brady* standards don't apply to the plea bargaining process, even innocent defendants may decide to plead because they are unaware of material evidence.[82]

Does open-file discovery place an undue burden on the prosecution?

Open-file discovery helps to require the strongest case possible for the prosecution. This makes the process more efficient and increases confidence in convictions, therefore reducing the likelihood of a conviction being overturned during appeals. C. Colon Willoughby, District Attorney in North Carolina's Wake County, believes that by sharing evidence, prosecutors can move cases faster and avoid the expense of trials — important considerations in areas with long court dockets. He says, "[Open-file discovery] is more likely to generate guilty pleas. If you have good evidence, the lawyer tells the client to plead guilty."[83]

Does open-file discovery require the prosecution to disclose privileged information?

Open-file discovery applies to evidence possessed by the prosecution, including witness statements, information relating to lineups, personal belongings of the defendant to be submitted as evidence, evidence negating guilt, and expert and police reports. It does not apply to notes, theories, opinions, conclusions, or legal research conducted by the prosecution. Disclosure of witnesses can also be denied by judges on a case by case basis in instances where there is a substantial risk of physical harm or intimidation.

Does open-file require the defense to turn over their evidence as well?

The burden to prove the defendant guilty beyond a reasonable doubt falls upon the state alone, and the information the defense may be required to disclose under reciprocal discovery is limited to notice of evidence and witnesses the defense intends to offer at trial. Moreover, the reciprocal discovery requirements made of defense counsel must be consistent both with a defender's constitutional role to advocate for a person who is presumed innocent until proven guilty and with a defendant's 5th amendment right against self-incrimination.

Some jurisdictions do require that both sides turn over information before trial. Reciprocal discovery is important in that both sides should have time to develop a response to the evidence presented by the other. Several states have requirements for reciprocal discovery under part of expansive discovery systems. The ABA standards require the defense to disclose certain information to the prosecution, including the names and addresses of all witnesses whom the defense intends to call at trial, and reports and statements made by experts as a result of physical or mental examinations which the defense intends to introduce at trial, as well as the qualifications of those experts, among other requirements.

Is it difficult to implement expanded discovery laws?

Expanded pre-trial discovery is not difficult to implement, especially since most states already have some form of discovery procedures in place. In fact, automatic discovery will cut down on court time and expense in that motions will not need to be filed for the appropriate pre-trial discovery to occur.

A MODEL POLICY

MODEL BILL FOR EXPANDED DISCOVERY IN CRIMINAL CASES*

Section I. Purpose.
Pretrial discovery procedures should, consistent with the constitutional rights of the defendant, promote the ascertainment of the truth in trials and resolutions by facilitating the full and free exchange of information such that prosecution and defense can be fully prepared for trial, provide the defendant with sufficient information to make an informed plea decision, and promote efficient resolution of the charges by reducing interruptions and complications during trial and avoiding unnecessary and repetitious trials.

Section II. Scope.
These standards should be applied in all criminal cases. Discovery procedures may be more limited than those described in these standards in cases involving minor offenses, provided the procedures are sufficient to permit the party to adequately investigate and prepare the case.

Section III. Definitions.

A. When used in this act, a "written statement"" of a person shall include:
   1. Any statement in writing that is made, signed, or adopted by that person; and
   2. The substance of a statement of any kind made by that person that is embodied or summarized in any writing or recording, whether or not specifically signed or adopted by that person. The term is intended to include statements contained in police or investigative reports, but does not include attorney work product.

B. When used in this act, an "oral statement" of a person shall mean the substance of any statement of any kind by that person, whether or not reflected in any existing writing or recording.

Section IV. Discovery Obligations of the Prosecution.

A. Independent of motion or request, the prosecution must disclose any material or information within the prosecutor's possession or control that *could be, should be, or is known to negate the guilt of the defendant* as to the offense charged or that would tend to reduce the punishment of the defendant.

B. Independent of motion or request, and regardless of whether the prosecution determines material to be relevant, irrelevant, inculpatory, or exculpatory, the prosecution shall disclose the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes, but is not limited to:
   1. All written and all oral statements made by the defendant or any co-defendant, and the names and addresses of any witnesses to such statements. This shall be disclosed regardless of when the statement was made, and any oral statement must be memorialized in writing.
   2. The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person. The prosecution shall also identify the persons it intends to call as witnesses at trial, even if the prosecution intends to call the witness as a rebuttal or character witness.
   3. All written and all oral statements made by witnesses;
   4. The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding, or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness. In addition, the prosecution should disclose the identity of any jailhouse informants, and any background information concerning such informants.
   5. The investigating officer's or officer notes;

   6. Results of tests and examinations, or any other matter of evidence obtained during the investigation of the offense alleged to have been committed by the defendant, including, but not limited to:
      a. Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, and without regard to whether the prosecution intends to call parties conducting the reports, tests, examinations, experiments, comparisons, or statements to testify. Tests, reports, and case notes prepared by state agencies or laboratories qualify as reports or written statements of experts under this section. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.
      b. Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, that pertain to the case or that were obtained for or belong to the defendant. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.
      c. Any materials, documents, or statements relating to any searches or seizures conducted in connection with the investigation of the offense charged or relating to any material discoverable under this act.
      d. Any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any codefendant, and insofar as known to the prosecution, any record of convictions, pending charges, or probationary status that may be used to impeachment of any witness to be called by either party at trial. While the prosecution is under no duty to conduct background checks of all witnesses, if the prosecution runs a general criminal records search for defense witnesses, the prosecution must make the same search with respect to prosecution witnesses and must disclose the results to the defense.
      e. Any materials, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case, and the identity of any witnesses to such lineup, showup, and picture or voice identifications.

C. If the prosecution intends to use character, reputation, or other act of evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

D. If the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact.

E. The prosecution shall disclose any and all contents of the files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant file not specifically listed or named above.

F. The prosecution must certify, in writing, that it has fully complied with the disclosure obligations contained in this act and acknowledging the prosecution's continuing obligation to disclose any discoverable information to the defense. This written certification must also contain a written statement from a designated lead investigator from each law enforcement agency involved in the investigation of the offense charged that confirms that the agency has given to the prosecution all information that, if known to the prosecution, would be discoverable.
   1. Certification must be completed as early as possible, but no fewer than five standard business days, prior to the start of trial or other resolution; and
   2. Certification must be completed earlier if the court rules, upon motion by the defense, that the defense requires additional time to incorporate complex, voluminous, or time-sensitive discovery material into the defense's case.

Section V. Disclosure Obligations of the Defense.

A. The defense should, within a specified and reasonable time prior to trial or other resolution, disclose to the prosecution the following information and material and permit inspection, copying, testing, and photographing of disclosed documents and tangible objects:
   1. The names and addresses of all witnesses (other than the defendant) whom the defense intends to call at trial, together with all written statements of any such witness that are within the possession or control of the defense and that relate to the subject matter of the testimony of the witness.
   2. Any reports made in connection with the case by experts whom the defense intends to call at trial. For each such expert witness, the defense should also furnish to the prosecution curriculum vitae.
   3. Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, that the defense intends to introduce as evidence at trial.

B. If the defense intends to rely upon a defense of alibi or insanity, the defense should notify the prosecution of that intent and of the names, home addresses, and if already required, statements of the witnesses who may be called in support of that defense.

Section VI. The Person of the Defendant.

A. After the initiation of judicial proceedings, the defendant should be required, upon the prosecution's request, to appear within a time specified for the purpose of permitting the prosecution to obtain fingerprints, photographs, handwriting exemplars, or voice exemplars from the defendant, or for the purpose of having the defendant appear, move, or speak for identification in a lineup or try on clothing or other articles. Whenever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place of such appearance should be given by the prosecuting attorney to the defendant and the defendant's counsel.

B. Upon motion by the prosecution, with reasonable notice to the defendant and defendant's counsel, the court should, upon an appropriate showing, order the defendant to appear for the following purposes:
   1. To permit the taking of specimens of blood, urine, saliva, breath, hair, nails, and material under the nails;
   2. To permit the taking of samples of other materials of the body;
   3. To submit to a reasonable physical or medical inspection of the body; or
   4. To participate in other reasonable and appropriate procedures.

C. The motion and order pursuant to paragraph (2) above should specify the following information where appropriate: the authorized procedure, the scope of the defendant's participation, the name or job title of the person who is to conduct the procedure, and the time, duration, place, and other conditions under which the procedure is to be conducted.

D. The court should issue the order sought pursuant to paragraph (2) above if it finds that:
   1. The appearance of the defendant for the procedure specified may be material to the determination of the issues in the case; and
   2. The procedure is reasonable and will be conducted in a manner that does not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual; and
   3. The request is reasonable.

E. Defense counsel may be present at any of the foregoing procedures unless, with respect to a psychiatric examination, it is otherwise ordered by the court.

Section VII. Timing and Manner of Disclosure.

A. Each jurisdiction should develop time limits within which discovery should be performed. The time limits should be such that discovery is initiated as early as practicable following the date of arraignment and is concluded and certified as early as practicable prior to resolution. The time limit for completion of discovery should be sufficiently early in the process that each party has sufficient time to use the disclosed information adequately to prepare for trial.

B. The time limits adopted by each jurisdiction should provide that, in the general discovery sequence, disclosure should first be made by the prosecution to the defense. The defense should then be required to make its correlative disclosure within a specified time after prosecution disclosure has been made.

C. Each party should be under a continuing obligation to produce discoverable material to the other side. If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information that is subject to disclosure, the other party should promptly be notified of the existence of such additional material. If the additional material or information is discovered during or after trial, the court should also be notified.

D. Disclosure may be accomplished in any manner mutually agreeable to the parties. Absent agreement, the party having the burden of production should:
   1. Notify opposing counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, or photographed during specified reasonable times; and
   2. Make available to opposing counsel at the time specified such material and information and suitable facilities or other arrangements for inspection, testing, copying, and photographing of such material and information.

Section VIII. Obligation to Obtain Discoverable Material.

A. The obligations of the prosecuting attorney and of the defense attorney under these standards extend to material and information in the possession or control of members of the attorney's staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney's office and of any others who have worked on the case for the prosecution or for the defense.

B. The prosecutor should make reasonable efforts to ensure that material and information relevant to the defendant and the offense charged is provided by investigative personnel to the prosecutor's office.

C. If the prosecution is aware that information that would be discoverable if in the possession of the prosecution is in the possession or control of a government agency not reporting directly to the prosecution, the prosecution should disclose the fact of the existence of such information to the defense.

D. Upon a party's request for, and designation of, material or information which would be discoverable if in the possession or control of the other party and which is in the possession or control of others, the party from whom the material is requested should use diligent good faith efforts to cause such material to be made available to the opposing party. If the party's efforts are unsuccessful and such material or others are subject to the jurisdiction of the court, the court should issue suitable subpoenas or orders to cause such material to be made available to the party making the request.

E. Upon a showing that items not covered in the foregoing standards are material to the preparation of the case, the court must order disclosure of the specified material or information.

Section IX. Restrictions and Limitations on Disclosure.

A. Disclosure should not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or the defense attorney, or members of the attorney's legal staff.

B. Disclosure of an informant's identity should not be required where the court determines that reasonable fear exists that disclosureure would lead to the informant being harmed and where a failure to disclose will not infringe the constitutional rights of the defendant. The court should not deny disclosure of the identities of witnesses testifying at trial.

C. Disclosure should not be required from the defense of any communications of the defendant, or of any other materials that are protected from disclosure by the state or federal constitutions, statutes or other law.

D. The court should have the authority to deny, delay, or otherwise condition disclosure authorized by these standards if it finds upon motion from the prosecution that there is substantial risk to any person of physical harm, intimidation, or bribery resulting from such disclosure that outweighs any usefulness of the disclosure.

E. Upon a showing of cause, the court may at upon motion by the prosecution order that specified disclosures be restricted, conditioned upon compliance with protective measures, or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled is disclosed in sufficient time to permit counsel to make beneficial use of the disclosure.

F. When some parts of material or information are discoverable under these standards and other parts are not discoverable, the discoverable parts should be disclosed. The disclosing party should give notice that nondiscoverable parts have been withheld and the nondiscoverable parts should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

G. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing, to be made in camera. A record should be made of both in court and in camera proceedings. Upon the entry of an order granting relief following a showing in camera, all confidential portions of the in camera portion of the showing should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

Section X. Interference With Investigation.
Neither the counsel for the parties nor other prosecution or defense personnel should advise persons (other than the defendant) who have relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel's investigation of the case.

Section XI. Custody of Materials.
Any materials furnished to an attorney pursuant to these standards should be used only for the purposes of preparation and trial of the case, and should be subject to such other terms and conditions as the court may provide.

Section XII. Sanctions.

A. If an applicable discovery rule or an order issued pursuant thereto is not promptly implemented, the court should do one or more of the following:
   1. Order the non-complying party to permit the discovery of the material and information not previously disclosed;
   2. Grant a continuance;
   3. Prohibit the party from calling a witness or introducing into evidence the material not disclosed, subject to the defendant's right to present a defense and provided that the exclusion does not work an injustice either to the prosecution or the defense; and/or
   4. Enter such other order as it deems just under the circumstances;

B. The court may subject counsel to appropriate sanctions, including a finding of contempt, upon a finding that counsel willfully violated a discovery rule or order or upon a finding that counsel has acted in bad faith in connection with these rules.

C. Consistent with the requirements of due process, where the prosecution fails to provide the defense with discoverable evidence either in bad faith or in such a manner as to prejudice the defendant's ability to prepare for trial and then seeks to introduce evidence at trial, the normal remedy should be exclusion of such evidence.

Section XIII. Admissibility of Discovery.
The fact that a party has indicated during the discovery process an intention to offer specified evidence or to call a specified witness is not admissible in evidence at a hearing or trial.

LITERATURE

SUGGESTED READINGS

The following materials are essential reading for individuals interested in enhancing the reliability of outcomes in criminal cases through expanded discovery.

ABA Standards for Criminal Justice: Discovery and Trial by Jury, 3d ed., *available at* http://www.abanet.org/crimjust/standards/discovery.pdf.

SELECTED BIBLIOGRAPHY

The following listing includes some of the key source material used in developing the content of this policy review. While by no means an exhaustive list of the sources consulted, it is intended as a convenience for those wishing to engage in further study of the topic of expanded discovery in criminal cases. Many of the entries contain hyperlinks for ease in locating an article, report or document on the web.

1. Law Reviews and Academic Journals

Stephanos Bibas, The Story of *Brady v. Maryland, in* CRIMINAL PROCEDURE STORIES (Carol Steiker ed., 2005).

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Jenny Roberts, *Too Little Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L. J. 1097 (2004).

2. Commission and Association Reports, Recommendations and Policies

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Conference of Superior Court Judges. *The New Criminal Discovery Rules*. James P. Cooney III, Frank R. Parrish, Ripley Rand, 2004. PowerPoint Presentation.

Texas Defender Service. *A State of Denial: Texas Justice and the Death Penalty*. Austin: Texas Defender Service, 2000.

Texas Defender Service. *Minimizing Risk: A Blueprint for Death Penalty Reform in Texas*. Austin: Texas Defender Service, 2005.